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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 80.

Office Supreme Court U.S.
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JAMES H. McKENNEY

FRANKLIN S. JEROME,
Plaintiff in Error,

vs.

CHARLES P. COGSWELL, THE STATE SAVINGS BANK, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

BRIEF OF PLAINTIFF IN ERROR.

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BULLETIN PRINT, NORWICH, CONN.

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STATEMENT OF CASE.

The Second National Bank of Norwich, Connecticut, was a banking association organized and existing under the banking laws of the United States and after its charter expired by lapse of time February 24th, 1904, its affairs were being settled in the manner provided by law when a complaint in equity against the Bank was brought by a stockholder to the Superior Court of Connecticut asking for the appointment of a receiver to wind up its affairs, and this proceeding resulted in the appointment of a permanent receiver. (See original record in the case made a part of the record in this case by stipulation. Record, page 2.)

The Receiver after his appointment while proceeding in the settlement of its affairs, filed his petition with the Court (see Record, page 3), stating that on May 24th, 1900, the capital stock of the bank was reduced from $300,000 to $200,000, and that at the time of and in connection with the reduction, assets of the face value of $101,000 were charged off and set aside; and that a question has arisen as to whether the proceeds of said assets be distributed to the stockholders of record at the time of said reduction or to the present stockholders and praying for an order to all stockholders at the time of said reduction and to all the present stockholders to appear and be heard relative to the ownership and distribution of said charged off assets.

Such orders were passed by the Court and due notice to such stockholders given and return made. (See Record, pages 4-6.)

The State Savings Bank and other stockholders (now defendants in error) representing 638 of the original 3000 shares appeared and filed claims to the charged off assets by virtue of their ownership of original stock when capital was reduced. (See Record, pages 10-13, for claims.)

C. P. Cogswell also filed a claim as the owner by written assignment of rights to the charged off assets, represented by 14/5 shares of old stock (see Record, pages 14-16), but the stock itself had been surrendered and new stock issued and that again transferred without reservation.

Franklin S. Jerome (plaintiff in error) and others, representing 1021 shares of the bank after the reduction, appeared and filed written claims to the charged off assets as a part of the capital stock of the bank to be distributed to them *pro rata*. (See Record, page 17, for claims.)

The Superior Court after a trial decided in favor of Franklin S. Jerome (plaintiff in error) et al., that the assets belonged to and were the property of the bank and should be distributed to the stockholders of record at the expiration of its charter. (See Record for judgment, p. 20, and memorandum of decision, pages 18-20.)

The State Savings Bank, et al., appealed to the Supreme Court of Errors, which rendered judgment that the stockholders of record at time of reduction were entitled to the charged off assets, and reversed the judgment of the Superior Court.

To reverse this judgment of the Supreme Court of Errors, Franklin S. Jerome has sued out this writ of error, the other like claimants to simplify the record having on notice refused to join in the writ. (Record, pages 59-60.)

SPECIFICATION OF ERRORS.

The Supreme Court of Errors of Connecticut erred in holding and deciding that Franklin S. Jerome, one of the appellees, as a shareholder in the Second National Bank, a banking association created by and organized under the statutes of the United States known as the National Bank Act, was not entitled to his

proportionate share as such shareholder in the so-called charged off assets and proceeds thereof, a part of the capital of said bank—a right and privilege specially claimed by said Franklin S. Jerome, under said statutes of the United States, and especially under Sections 5133, 5134, 5136, 5139, 5143, 5145, 5199 and 5204 thereof—and in holding that there was an error in the judgment of the Superior Court in favor of said Franklin S. Jerome on said claims, and in reversing said judgment.

Said errors are more particularly set forth as follows:

Said Court erred in holding and deciding,

First. That the comptroller of the currency under the Acts of Congress, the Banking Laws of the United States, and especially under Section 5143, had any power to order the directors, as a condition to his approval of the reduction of capital of said bank, to return to or set apart in trust for the stockholders of record said charged off assets, as was done in the directors' vote of June 27th, 1900.

Second. That the certificate of approval by the comptroller of the currency of said reduction, issued and dated June 9th, 1900, Exhibit "K," was not absolute and unconditional, but was issued on the condition that the directors of said bank would charge off certain bad, doubtful, and unproductive assets and set them aside for the benefit of the shareholders at the date of such approval.

Third. That the directors had the power under Sections 5145, 5199, 5204, or under any other provisions of said National Bank Act to pass the vote of June 27, 1900, Exhibit "M," and thereby separate said assets from the capital of said bank and set them apart for the stockholders of record and create said trust fund; and in ruling that the result and effect of said vote was to create a trust fund in said assets for the benefit

of stockholders of record and divert the same from capital of said bank and from the owners of the shares in said capital.

Fourth. That the vote of the directors of June 27, 1900, Exhibit "M," was the declaration of a dividend from assets in excess of the capital stock, and that said assets were equivalent to net profits within the meaning of Sections 5199 and 5204 of said National Bank Act, and that the directors had power under said Sections or any provisions of said Bank Act to pass said vote, set apart said assets as therein provided, and declare such dividend.

Fifth. That the right to receive what might ultimately be realized from the assets and fund set apart by said vote of said directors became irrevocably vested in those who were shareholders on June 9th, 1900, apart from their continued ownership of stock in said bank and that the sale and transfer of their shares in said capital stock, without reservation, did not transfer, and that the said Franklin S. Jerome had not acquired by such transfer and the issue to him of new certificates therefor by said bank, all the rights of said prior holders, including the right to said charged off assets, under Section 5139, of the United States Revised Statutes.

BRIEF OF ARGUMENT.

THIS WRIT OF ERROR PRESENTS QUESTIONS WITHIN THE JURISDICTION OF THIS COURT UNDER U. S. REV. STATUTES, SEC. 709.

The record in the finding of facts (page 22) shows that the Second National Bank, the defendant in the original action in the State Court, in which a receiver was appointed, was a banking association existing and incorporated under the laws of the United States known as the National Bank Act; that the Court

on the application of the receiver after notice to persons who were stockholders of record when the capital of the bank was reduced, and to all present stockholders who were stockholders at the expiration of the charter of the bank, decided that certain assets were a part of the capital of the bank and should be distributed to the stockholders at expiration of charter by virtue of their stock certificates representing a proportionate interest in the capital.

The present plaintiff in error was one of such stockholders, holding 1021 shares, and the decision sustained his right claimed under his stock certificate issued by a National Bank under the laws of the United States, and determined in his favor as incidental thereto the claims made by him that the directors had no power under the National Bank Act to set aside the assets as attempted by the vote when the capital was reduced, that such vote had no such effect and was not the declaration of a dividend authorized by such laws, and that the surrender of the old certificates and the issuing of new shares and the subsequent transfer of such shares without reservation to the plaintiff in error entitled him as such stockholder under the provision of the National Bank Act governing the transfer of stock to his share in said assets.

The Supreme Court of Errors in its judgment on which this writ of error was issued, reversed the decision of the Superior Court and held that under the aforesaid laws of the United States, the persons who were stockholders when the capital was reduced were entitled to such assets, and thus denied the rights claimed by the plaintiff in error.

This decision presents a question within the jurisdiction of and reviewable by the Supreme Court of the United States on writ of error under

U. S. Statutes, Sec. 709.

"When the highest Court of a State by any form of decision affirms or denies the validity of the judgment of an inferior court over which it by law can exercise appellate jurisdiction, the jurisdiction of this Court to review such decision if it involves a Federal question, will upon a proper proceeding attach."

Williams vs. Bruffy, 102 U. S., 248.

The rights and privileges claimed by the plaintiff in error were all made under and depended upon his stock certificates issued by a National corporation under the laws of the United States and all his rights were governed and controlled by the laws of the United States and these rights were not only claimed as shown by the claim (page 17), the memorandum of decision (pages 18-20), opinion of Supreme Court (pages 54-7), but they were necessarily involved in the question before the Court, and determined by its decision.

"If from the questions it appears that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States within the meaning of that term as used in the Act of 1875; otherwise not."

Starin vs. New York, 115 U. S., 248.

"Jurisdiction may be maintained when a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of."

Mutual Life Ins. Co. vs. McGrew, 188 U. S., 309.

"It is not necessary to state in terms on the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the cause within the provisions of the twenty-fifth Section of the Judicial Act, if the record shows that the Constitution or a law or a treaty of the United

States must have been misconstrued or the decision could not be made."

Wilson vs. Marsh, 2 Pet., 245.
Crowell vs. Randall, 10 Pet., 368.
Furman vs. Nichol, 8 Wall., 56
William vs. Hurd, 140 U. S., 529.
Forks National Bank vs. Anderson, 172 U. S., 573.
McCormick vs. Market National Bank, 165 U. S., 538.
Waite vs. Dowley, 94 U. S., 532.
Kaukauna vs. Green Bay, 142 U. S., 269.
Logan Co. Bank vs. Townsend, 139 U. S., 67.
Swope vs. Leffingwell, 105 U. S., 3.
California Bank vs. Kennedy, 167 U. S., 366.
Green Bay, &c., vs. Patten Paper Co., 172 U. S., 58.
Yazoo, &c., R. Co. vs. Adams, 180 U. S., 15.
Home for Incurables vs. New York, 187 U. S., 155.

THE DETERMINATION OF RIGHTS OF STOCKHOLDERS TO A DISTRIBUTION OF THE ASSETS DEPENDS UPON THE EFFECT OF THE REDUCTION OF CAPITAL, THE APPROVAL OF THE COMPTROLLER AND THE VOTE OF THE DIRECTORS IN RELATION TO THE CHARGED OFF ASSETS.

THE CAPITAL OF THE BANK WAS REDUCED FROM $300,000 TO $200,000. (SEE VOTE, RECORD, P. 33.)

COMPTROLLER MUST APPROVE REDUCTION OF CAPITAL.

It is provided by Sec. 5143, Revised Statutes of U. S.,

"Nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

The Comptroller is simply an executive officer charged with the duty of administering the National Bank Act, and he has no power to add to or take away from these laws.

U. S. Revised Statutes, Sec. 324.

He cannot increase or reduce the capital of the bank and he has no power to require shareholders to withdraw any part of the capital invested in the banking business; his approval either of an increase or a reduction of capital extends only to the conditions imposed by the National Bank Act upon the right of the shareholders either to increase or reduce the capital.

COMPTROLLER'S OFFICIAL CERTIFICATE OF APPROVAL UNCONDITIONAL.

This is shown by the certificate itself (Exhibit "K," Record, p. 35), and it will be noted that the certificate was dated and mailed from Washington on June 9th, while the statement itself of the directors was dated and mailed at Norwich on the same day, and did not reach Washington until later, as shown by the Comptroller's letter (Exhibit "L," p. 35), and the actual vote of the directors attempting to set apart these assets was not made until June 27th (Exhibit "M," p. 35).

All conversations and letters prior to June 9th became merged in the official certificate of approval executed and issued on that date.

This official certificate is conclusive and cannot be attacked, changed or added to collaterally, as would appear by analogy from

Bailey vs. Tillinghast, 99 Fed. R., 808, and cases cited.

But the Court, aside from the certificate, finds as a fact that the only condition actually imposed was in the letter of May 15th in the words,

"PROVIDED SO MUCH OF THE AMOUNT AS IS NECESSARY IS USED TO CHARGE OFF BAD, DOUBT-

FUL AND UNPRODUCTIVE ASSETS, THE DIFFERENCE ONLY BEING PAID TO THE SHAREHOLDERS IN CASH."

The reference in the letter of May 19th to the rights of the shareholders, either to the cash or charged off assets, is not a condition imposed or intended to be imposed upon the right to reduce the capital, but is merely a statement of the Comptroller's opinion of the law governing the rights of stockholders after the reduction had taken place. He says in one sentence that the consent of the shareholders must be obtained for the withholding from him of any money to which he may be entitled by reason of the reduction, only in case the whole amount of the reduction is not required to charge off bad, doubtful and unproductive assets.

The law determines the rights of the shareholder, and the Comptroller could not change such rights. He did not impose, as a condition precedent to the reduction, that the cash or property should be either held or returned.

The Superior Court conclusively determined the facts in its finding (Record, pp. 22-29) and found as a fact that the Comptroller's letter of May 15, Exhibit "F," 32, embodied the condition on which the reduction would be approved.

The Supreme Court of Errors has no jurisdiction to determine facts, and will review facts only where a conclusion of fact is drawn from other detailed facts, and this Court can review the same question.

The conclusion of the Superior Court was correct on this point: The letter of May 15 was written in relation to the stockholders' meeting about to be held which actually voted the reduction. All prior correspondence was in relation to the meeting and vote which failed for lack of the necessary votes. THE REQUIREMENT AND PURPOSE OF THE COMPTROLLER SHOWN BY ALL HIS LETTERS (PP. 31, 32, 34), WERE THAT REDUCED CAPITAL BE USED TO CHARGE OFF BAD DEBTS SO FAR AS NEC-

ESSARY AND THE EXCESS ONLY PAID IN CASH TO THE STOCKHOLDERS.

He was seeking to prevent any payment of cash to stockholders until all bad debts had been charged off, and not seeking to compel the payment of cash to stockholders; they could look out for themselves in respect to that as the law would protect them.

CAPITAL REDUCED TO MEET IMPAIRMENT OF CAPITAL AND NOT TO SET FREE CAPITAL.

The Court has found as a fact that the reduction of capital was made to meet the diminution of the assets of the bank, caused by charging off the assets described in said schedule which were bad and doubtful assets within the meaning of Sec. 5204, U. S. Revised Statutes, and as the Court has found that it had a surplus at that time of from forty to fifty thousand dollars, if these bad debts had all been charged up, its capital would have been impaired from fifty to sixty thousand dollars, and out of that apparent surplus losses were afterwards deducted of from twelve to fifteen thousand dollars. (Record, p. 24, Sec. 18; p. 47, Sec. 17).

The Court has also found that the intent and purpose of the reduction was to charge off the amount of bad and doubtful debts in the schedule and cover any impairment of capital and still leave the bank with a fair surplus. (Record, p. 24, Sec. 17; p. 29, ruling 3).

The bank needed a surplus, for without it, any new loss would have impaired its capital, and until it had a surplus fund equal to twenty per cent. of its capital stock, it would be required to carry one-tenth part of its net profits to its surplus fund under the provisions of Sec. 5199, U. S. Revised Statutes.

See letter, p. 30, line 10. Vote, p. 31, line 20. Letter, p. 32, line 13. Letters, p. 34. Vote, p. 35.

PLAN OF REDUCTION WAS TO USE ENTIRE AMOUNT TO CHARGE OFF BAD ASSETS AND LEAVE BANK WITH A SURPLUS.

The condition imposed by the Comptroller required all of the reduction, if necessary, to be used to charge off bad assets, and it must be assumed that the Comptroller knew of the bank's statement and condition, and his approval of the reduction upon condition that it all be used to charge off bad debts, which precluded the use of the surplus for that purpose, must be assumed to have included the plan of leaving the bank with the surplus which its statement showed.

CONDITION OF BANK AT TIME OF REDUCTION.

Leaving out of consideration the general liabilities of the bank because it had sufficient cash and assets to meet its liabilities, we take up only its capital stock account.

Its capital stock of $300,000. before the reduction, constituted a liability to stockholders in that amount and to meet that it had, not cash, but sundry items of personal property carried on its books at from $340,000. to $350.000.

But it had already suffered losses on one hundred thousand dollars' worth of these items, which were bad debts under the National Bank Act, Sec. 5204, and had to be charged off, and that would impair its capital from fifty to sixty thousand dollars, provided all of its surplus was used in charging off, and then either an assessment must be made or a reduction of capital.

The bank decided to reduce its capital $100,000. on account of the $100,000. of bad assets (See Exhibit "D," p. 31, and Exhibit "M," p. 35), and the Comptroller imposed the condition that the entire amount, if needed, be used to charge off bad assets. It was all needed and was all so used (Record, p. 24, par. 15), and the Comptroller necessarily approved the retention of the surplus which the bank's statement showed after the reduction.

The reduction relieved the bank of a liability to stockholders

for $100,000. and enabled it to charge to profit and loss $100,000. of losses which had taken place before that time, but which now appear for the first time on its books by the reduction to that amount in the book value of sundry assets.

NO RELATION OR IDENTITY, EITHER IN FACT OR LAW, BETWEEN THE REDUCTION AND ANY SPECIFIC PROPERTY OF THE BANK.

The purpose of the National Bank Act, to be effected through the supervision of the Comptroller, is that the capital of a bank shall not exceed, but must be kept in line with the actual value of the assets. If the value of the assets falls off, it can be accomplished either by an assessment, thus increasing the value of the assets, or by a reduction of the capital, thus decreasing liabilities.

In both cases the title to all the assets of the bank is undisturbed and remains in the bank.

In the case of a reduction of capital made necessary by a depreciation in the value of its assets, the reduction is caused by the general depreciation or falling off of the total value of all the assets, but all the assets whether finally carried at some or no valuation, still belong to the bank and represent its capital, and it is the loss or depreciation alone that represents the reduction in capital stock liability and is charged off to meet it.

In this case several of the so-called charged off assets were not treated as a total loss, but were still carried after the reduction at a valuation which went to make up the new capital, but the principle and effect are the same, whether the entire face value or three-fourths face value is treated as a loss, for it is the loss in value and not the specific asset which represents and offsets the reduction.

This is illustrated by assuming a case where the loss on every one of the assets is only a part of its face value and every asset at a less valuation is still carried on the books and goes to make up the new capital. It is clear that the reduction in such a case

would not effect a change in the title to the assets, but that the specific assets would still belong to the bank and be subject to disposition by it.

NO LIEN OR CHARGE IN LAW OR EQUITY IN SUCH A CASE AGAINST THE ASSETS, AND IF SO, NO POWER IN THE DIRECTORS TO CREATE ONE.

REDUCTION OF CAPITAL STOCK TO SET FREE UNEMPLOYED CAPITAL WOULD NOT VEST TITLE IN STOCKHOLDERS TO ANY SPECIFIC ASSETS.

If the capital stock, instead of having been reduced to meet losses, had been reduced for the express purpose of setting free unemployed capital to the extent of $100,000., such reduction would not have vested title to any specific assets in the shareholders, nor would the directors have had any power to set apart any specific assets, or allow the shareholders to take, or compel them to take, any specific assets, as representing said reduction but the shareholders would still have held their interest, as such in all of the assets of the bank and would have had a right of action simply against the bank to compel the payment of the amount of the reduction.

If such a reduction to set free capital, does vest title, equitable or otherwise in specific assets of the bank, what assets are they and who is to designate them? The directors could set apart such assets as they saw fit, and compel the stockholders to accept them, if such is the case.

The shareholders in this case all surrendered their stock and took new certificates and made no claim to the return of any capital set free and waived any such claim, and consented to the bank's retaining the capital including the surplus. The delay in making any such claim and the changes in the property and affairs of the bank which have occurred in the meantime, are a bar to any such claim by shareholders now.

The case of Seeley vs. Bank, 8 Daly, 400, is entirely different

from this case, but illustrates the principle that when reduction is made to *release unemployed assets*, the right of the stockholder is not to any specific assets, but simply his general equitable right to be paid or have returned to him in money the proportionate share, represented by his stock, of the reduced capital. In that case, the bank reduced its capital two-fifths or $200,000. and stockholders voted to return $100,000. to stockholders and carry $100,000. to surplus. That is, the bank had a surplus entirely apart from reduction and actually had $100,000. to carry to the surplus on reduction which is not the case here. Seeley refused to surrender his certificate on these terms, but offered to surrender it, and demanded a new certificate for three-fifths and cash for two-fifths of the amount of his shares, and in an action for equitable relief, his contention was sustained.

In the case at bar, no cash was set apart and none carried to surplus, and the entire $100,000. was treated as of no value at that time, and there is no evidence that at that time it had any value, or if so, what it was. Entirely apart from this transaction the bank had a surplus at this time and before this time, and this surplus had been created according to law by carrying one-tenth of the net profits to that account, and it was a surplus *created from earning* and not from reduced capital which distinguishes this case in principle from the Seeley case. While the Court has found this surplus existed on an actual, and not a book value of the assets, no issue was made on that point on the claims as they existed in the case at the time, and it appears some of the assets on which the surplus depended, had later to be charged off to the extent of $12,000. to $15,000. (Record, p. 24, Sec. 18).

To hold that the bank could not reduce $100,000. to charge off bad assets of $100,000., when it already had a surplus outside of that, is simply to hold the reduction bad, and it was conceded by the parties that the reduction was valid. It was intended to make the reduction and use it in that way and leave the surplus intact and the Comptroller approved it on those terms. To have stripped the bank of all of that surplus would

have left it in bad condition and with its capital soon to be impaired again. It cannot be determined now whether any or how much of the surplus might have been spared and used for either charging off bad assets or returning capital to stockholders, and that was a question for the bank and the Comptroller to decide at that time.

ASSUMING THAT AN EQUITABLE TITLE VESTED IN THE STOCKHOLDERS TO THE ASSETS ACTUALLY CHARGED OFF, IT IS APPARENT THEY ARE NOT ENTITLED IN EQUITY TO THE ASSETS NOT FULLY CHARGED OFF, BUT CARRIED IN AND NECESSARY TO MAKE UP NEW CAPITAL.

The finding (p. 25, Sec. 21), shows that the asset in bond account Am. Linseed Oil Co. had a face value $6,125., of which $5,125. was charged off as a loss and the bonds themselves were still carried at $1,000. in the live assets to make the new capital, and the item F. P. Geer note had a face value $10,470.04, of which $8,470.04 was charged off as a loss and the note itself still carried at $2,000. as a live asset to make the new capital.

The demand loan E. A. Packer, $15,647.50., was charged off, but the bank held Wisconsin R. Co. stock as collateral and under the head of Note C. P. Cogswell, Tr., $1,187.50., discounted by it to pay an assessment on this stock, still carried it as a live asset and finally realized on this collateral $11,985.26 (p. 42, Sec. 23½).

This, which constitutes about one-half the entire amount realized from charged off assets, should surely remain in the capital of the bank and go to the present stockholders.

This point is well illustrated by assuming that to offset a capital of $300,000. the bank owned 300 $1.000. bonds which had fallen off in value one-third. If the bank reduced its capital $100,000. to meet the loss, the bonds would still belong to the bank, and if their value was subsequently increased or restored, no part of them would belong to the old stockholders nor would such stockholders have any lien or charge upon them.

IT MUST BE NOTED THAT THE OLD STOCKHOLDERS HAVE NOT PRESENTED, AND DO NOT MAKE ANY CLAIM UPON THE GENERAL ASSETS FOR A SHARE OF ANY CAPITAL SET FREE BY THE REDUCTION, BUT HAVE SIMPLY CLAIMED THE RIGHT TO OWNERSHIP OF THE SPECIFIC ASSETS ON WHICH THE LOSSES OCCURRED CAUSING THE REDUCTION AND WHICH WERE CHARGED OFF TO MEET IT.

If they had the right to a return of cash from the general assets, then the directors had no power to turn over to them assets of no value.

It is true they might waive their right and accept them, but in this case they did not, as nothing has ever been delivered or paid to them, and the record does not disclose that the stockholders ever had any knowledge of the vote.

THE STOCKHOLDERS TOOK NO ACTION AS TO THE DISPOSITION OF THE CHARGED OFF ASSETS.

See Exhibit "D," 31, Exhibit "H," 33. At stockholders' meeting, April 3d, a list of items was presented, amounting to $101,317.86 to be charged off, showing that the stockholders knew that the reduction was all to be used for that purpose.

The directors after the reduction passed a vote (p. 35, Exhibit "M.")

"That the assets of this bank contained in the accompanying schedule, which assets are considered either bad or doubtful and on account of which the capital stock of this bank has been reduced from $300,000. to $200,000. be set aside from the other assets of the bank and be held by it in trust for the stockholders of record on the 9th day of June, 1900, and that whatever may be realized from said assets be distributed from time to time as may be reasonable among said stockholders in proportion to their respective holdings on said date."

There was no capital set free or cash to pay to stockholders

and this was but a promise to pay something to be realized in the future and was binding the bank to go to the expense of holding and managing the property.

THE DIRECTORS HAD NO POWER TO SET APART ANY SPECIFIC ASSETS FOR THE STOCKHOLDERS OF RECORD.

The directors of a national bank have no power to reduce its capital, or to make an assessment, but the stockholders alone have such power.

U. S. Rev. Stat., Sec. 5143.

Commercial National Bank v. Weinhard, 192 U. S. 249.

The powers and duties of Directors are defined and limited in U. S. Rev. Stat., Secs. 5136 and 5145.

The stockholders alone have the power to determine the amount of capital stock to be used in the banking business and to increase or reduce the amount of that capital.

U. S. Rev. Stat., Secs. 5134, 5142, 5143.

It is the duty of the Directors to use the capital of the bank in managing its affairs to further the object for which the bank was created, and it necessarily follows that the Directors have no power to decide not to use capital for the purpose determined by the stockholders, but to return it to them.

The property and assets in specie of a National Bank represent its capital without regard to any value fixed upon them by estimate or appraisal, and when the capital is reduced, the specific assets are still capital and represent the capital as reduced, and any amount of estimated or appraised value set upon the assets in excess of the capital is still capital, which it is the duty of the directors to keep employed in the business of the bank.

The reduction in the present case was made to meet an im-

pairment of capital caused by losses; the losses were charged off; the specific property or choses in action, on which the losses occurred, still remain the property of the bank and assets, even though by an appraisal they are estimated or valued at nothing. Several of these specific items of property still had an estimated value and went to make up the reduced capital of the bank at such valuation and it was the estimated loss alone that was charged off.

We contend that all these assets still constituted the capital of the bank after the reduction; they must be either capital or earnings, and they surely are not earnings.

As the capital was reduced solely to meet an impairment caused by losses, there was no capital left unemployed and released, to be returned to the stockholders.

All the specific property and assets of the bank after the reduction represented and made up the capital stock as reduced and neither the stockholders nor the directors had any power to take any of this specific property from the bank and restore it to the stockholders whether by an appraisal it was valued at something or nothing, for the capital was reduced solely to meet an impairment and there was no unemployed capital left.

U. S. Rev. Stat., Sec. 5204.

In McCann vs. First National Bank, of Jeffersonville, 112 Ind., 358, the Court after stating that a bank might reduce on account of unemployed capital and that in such a case the excess could not be carried to surplus and be diverted from the stockholders without their consent, say, "The appellant surrendered his proportion necessary, as a consideration, immunity from impending assessment and the privilege of holding the residue in a continuing association. Delano vs. Butler, 118 U. S., 634.

"Having received the whole consideration upon which the surrender was made, the stockholder could not receive more simply because the bank succeeded in realizing upon the notes and bills which caused suspension. Corporations have no implied power to enlarge or diminish their capital or distribute among the

shareholders any part of the fund which constitutes the capital stock, prior to the winding up. Sutherland vs. Alcott, 95 N. Y., 93.

"Persons who invest in banks, must look to Acts of Congress for authority to demand the return of any part of the capital, or gains in shape of dividends.

"Section 5143 * * required the bank to obtain the approval of the Comptroller to the proposed reduction and the proceedings for diminishing the capital ended with the approval obtained.

"The capital as reduced and the assets then held, constituted a trust fund upon the faith of which it was authorized to proceed with business.

"The directors had no authority thereafter to permit the capital or assets to be further depleted by distribution in one way or the other, of bills and notes among stockholders. In re Ex. Bank Co., L. R. 21 Chan. Div., 519.

"The bank could only distribute surplus in money when it accumulated it in the course of its business and the right to distribute would depend on an examination at the time. Strong v. Brooklyn C. R. Co., 93 N. Y., 426."

In McCann, Trustee, v. First Nat. Bank, of Jeffersonville, 131 Ind., 95, the Court say, "Conceding without deciding that the stockholders of a bank, the stock of which is intact, may voluntarily reduce the capital under the statute and withdraw an equal amount of assets, the question remains, can they take such action when the reduction is involuntary and only made to an amount equalling the impairment of assets.

"The right to withdraw in one case, would not involve it in the other.

"In the latter case the reduction is made because the amount of investment is lost and already involuntarily withdrawn. * *

"The stockholders had no power to withdraw the assets and no valid trust was created."

The authority of these cases is supported and has been taken as the foundation for the text by the following text-writers.

1 Cook on Corporations (5th Ed.), Sec. 289.

2 Thompson, Com. on Corporations, Sec. 2119.

A stockholder has no title to any portion of the property of the corporation. His rights as shareholder are merely contract rights and his certificate is merely a symbol of an incorporeal right which he posseses to a proportionate share in the capital stock and net earnings.

The corporation stands in the nature of a trustee as to the corporate property, to apply it first, to pay debts, and, second, upon a winding up to restore to the shareholder his proportionate share of the proceeds.

2 Morawetz on Priv. Corp., Secs. 224, 226.

Jermain v. Lakeshore, 91 N. Y., 483 (491.)

Money distributed by a corporation upon winding up its affairs is capital and not earnings.

Gifford v. Thompson, 115 Mass., 478.

The vote of the directors was not the declaration of a dividend.

The power of the directors of a National Bank to make dividends is limited by the provisions of the United States Statutes and dividends can be made only from net profits.

"Sec. 5199. DIVIDENDS.

"The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half-year to its surplus fund until the same shall amount to twenty per centum of its capital stock."

"Sec. 5204. PROHIBITION UPON WITHDRAWAL OF CAPITAL.

"No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to

be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any association, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in the process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three."

These so-called charged-off assets were not net profits.

The directors had no power to create any different trust in any part of the capital of the bank than that which the law creates, namely, that upon a winding up of its affairs after the payment of all debts, the net proceeds of the corporate property are held in trust for the shareholders in the bank.

Even though it were to be held that title to these assets vested in the stockholders, and the directors could have delivered them to the stockholders, they surely had no power to bind the bank to hold and administer them in trust, and go to a large expense in doing so.

SHAREHOLDERS AT REDUCTION BY TRANSFERRING THEIR SHARES TRANSFERRED ALL THEIR RIGHTS IN CAPITAL.

The present claimants are all present shareholders in the bank, and the other claimants, who were shareholders at the time of the reduction of capital, have sold and transferred their shares, without any exception or reservation of rights, and ceased to be shareholders.

The nature of the interest of a shareholder has already been considered and the transfer and the effect of a transfer by the

shareholder of his shares is provided for and governed by the National Bank Act.

"Sec. 5139. SHARES OF STOCK AND TRANSFERS.

"The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

Under this law the shareholders at the time of the reduction by transferring their shares, parted with every interest in the capital stock of the bank and the present shareholders have succeeded "to all the rights and liabilities of the prior holder."

INTEREST OF SHAREHOLDERS.

Present stockholders:—

F. S. Jerome, et al., claimants, represent	1102 Shares.
C. P. Cogswell represents	519 Shares.
State Bank represents	66 Shares.
	1687
Not represented,	213

All the other defendants are not present shareholders, and C. P. Cogswell has secured assignments of the rights in 1472 shares of the old stock, the new stock itself having been transferred, and much of it now represented by the appellees.

Old stockholders represented:—

~~F. S. Jerome, et~~ al.,	638 Shares.
C. P. Cogswell secured assignment of rights in	1472 Shares.
	2110

By comparison with the original complaint, it will be seen that Cogswell has secured the rights in 996 of the 1472 shares since these proceedings were instituted, and all of them since the shareholders had surrendered their old shares without reservation and transferred the new shares which they received for the old ones.

DECISION ON DEMURRER IN COGSWELL VS. SECOND NATIONAL BANK, 76 CONN., 252, NOT DECISIVE OF THIS CASE.

The decision of the Supreme Court of Errors on the demurrer to the complaint in the original action referred to in the opinion has no bearing in this case for the reason that the complaint alleged that the bank set apart the assets and it did not appear that the reduction was solely to meet an impairment of capital and the facts as to the details of the action by the stockholders and the approval of the Comptroller and the details as to the nature and condition of the specific property, did not appear, so that the question could not be fully made on demurrer to the original complaint, and that case was between different parties, and could bind the stockholders as to the distribution of the capital.

Respectfully submitted,

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